THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

January 29, 1954

Hon. John C. White, Commissioner
Texas Department of Agriculture
Austin, Texas

Opinion No. MS 115

Re: Participation by the Texas Department of Agriculture with the Federal Government and Inspection Association, Inc. in a cooperative agreement regarding inspection service for grading agricultural products in Texas.

Dear Mr. White:

You have asked this office for an opinion as to whether the Commissioner of Agriculture is authorized to enter into the proposed cooperative agreement between the Production and Marketing Administration, United States Department of Agriculture, Inspection Association, Incorporated, and the Texas Department of Agriculture concerning inspections of fruits, vegetables and peanuts.

The authority of the Commissioner of Agriculture to enter into cooperative agreements with respect to the inspection, grading, and classification of fruits and vegetables is set forth in Articles 117, Sec. 3; 118a, Sec. 3; 118c-1, Sec. 10; 118c-2, Sec. 10. Under these statutes, the Commissioner is given the authority to enter into such cooperative agreements with the United States Department of Agriculture. The principle is well settled that a public officer possesses only such powers as are expressly conferred upon him by law or are necessarily implied from the powers so conferred; he cannot legally perform acts not authorized by existing law; 34 Tex. Jur. 440, 441, Public Officers, Sec. 67. Statutes which prescribe and limit the exercise of official duty are strictly construed with respect to the powers conferred and the manner of their exercise, and such powers are not to be enlarged by construction. Bryan v. Sundberg, 5 Tex. 418 (1849).

43 Am. Jur. 68, Public Officers, Sec. 249, states:

> "In general, the powers and duties of officers are prescribed by the Constitution or by statute, or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified."

Nowhere in any of the statutes under consideration herein is the Commissioner of Agriculture given authority to enter into a cooperative agreement with anyone other than the United States Department of Agriculture. It is our opinion, therefore, that the Commissioner cannot enter into a cooperative agreement with anyone other than the United States Department of Agriculture and its agencies. Thus, the Commissioner cannot enter into the proposed cooperative agreement to which a private corporation is a party.

There is, of course, further reason for the legislative intent to limit participation in the implementation of the inspection laws under consideration to agencies of the State of Texas and the Federal Government. The mandatory inspection of designated agricultural products by the State of Texas is an exercise of its police power as a sovereign. Such inspection necessitates the exercise of discretion and responsibility incidental to governmental power, which cannot be delegated to or possessed by any other than public officials acting for, and as a part of, the Government. It is imperative that such inspections be conducted under such conditions and control that "questions can be approached and determined impartially, unbiased, and without adverse personal interest." State v. Damman, 277 N.W. 278 (Wis. Sup. 1938 - later reversed on other grounds.)

The proposed cooperative agreement gives to a private corporation the sole power and authority to select the inspectors, and to direct, control and supervise them and their work. The agreement gives to the Federal Government the sole right to discharge such inspectors. Finally, the proposed agreement gives to the State of Texas the compulsory duty to "rubber stamp" such inspectors as "employees of the State of Texas." This proposition is contrary to the basic concepts of the relationship of employer and employee.

It is particularly untenable in view of the statutory provisions of Articles 118a, 118c-1 and 118c-2 which impose upon the Commissioner of Agriculture the duty and authority to direct and enforce these mandatory inspection laws through his

inspectors. In addition, Article 117, Vernon's Civil Statutes, provides that the inspectors who are to inspect fruits other than citrus, and vegetables, other than potatoes, shall be appointed by the Commissioner of Agriculture.

Public office is a public trust. This trust includes the duty and responsibility to select competent employees, to exercise proper supervision, direction and control over them, and to terminate the services of those who prove to be incompetent. It is elementary that such duty and responsibility cannot be delegated by a public official other than to a deputy. It is well stated by the Court in the case of Wagner v. Urban, 170 S.W.2d 270 (Tex. Civ. App. 1943) that:

> "Public officers are under bond and have taken an oath to perform their official duties according to law and the law has wisely provided remuneration commensurate with the official duties required of them but a public official is not authorized to delegate his official duties to another, other than to a deputy. . . . ."

43 Am. Jur. 77-78, Public Officers, Sec. 260, states:

> "The obligations of public officers as trustees for the public are established as a part of the common law. . . . Among their obligations as recipients of a public trust are . . . to exercise a proper degree of care in the choice of their subordinates."

Under the proposed agreement, a private corporation would perform the duties and exercise the powers of the Commissioner of Agriculture with respect to his employees. There is no Texas statute authorizing incorporation for the purpose of holding public office or empowering a corporation to do so. 34 Tex. Jur. 346, Public Officers, Section 16, states:

"A corporation cannot hold a public office," citing City of Corpus Christi v. Mireur, 214 S.W. 528 (Tex. Civ. App. 1919, error ref.). In that case the Court held:

> "No Constitution or statute has ever contemplated that a corporation should be appointed to and exercise the powers of any office. It could not qualify as an officer or perform the functions thereof."

It is our opinion that the Commissioner is not authorized under the statutes under consideration to delegate to a private corporation his authority and responsibility to select, direct, control, and supervise State Inspectors. However, we think that the Commissioner does have statutory authority to agree to joint supervision, direction, and control by the State and Federal Governments of all inspectors who perform inspection services under a valid cooperative agreement between the State of Texas and the Federal Government.

Part III(a) of the proposed agreement places the authority for the fixing of the rate of all inspection contributions in the administrative officer (who is to be appointed by the Executive Committee of Inspection Association, Inc.) subject to approval by the Executive Committee of Inspection Association, Inc. Articles 118a, Sec. 12; 118c-1, Sec. 10, and 118c-2, Sec. 10, provide, in part:

> ". . . the Commissioner is hereby authorized and empowered to enter into agreements with the United States Department of Agriculture and the Inspection Service of the Federal Bureau of Agricultural Economics, relative to the amounts of contributions to be received from dealers and shippers for inspecting and grading services under the terms and provisions of this Act; it is further provided that the Commissioner may, in his discretion, adopt rules and regulations relating to such inspection contributions which will, in effect, adopt the financing plan provided under the Cooperative Agreement, . . ."

Each of these statutes then proceeds to establish a maximum amount which may be fixed as inspection contributions as to each product. It is clear that the Commissioner has a statutory duty relative to the fixing of the rates of inspection contributions which cannot be delegated to or assumed by a private corporation.

In our opinion any provision of an agreement which the Commissioner could approve relating to the fixing of contributions must conform to the statutory provisions and should also incorporate the maximum amounts of contributions as provided in Articles 118a, Sec. 12; 118c-1, Sec. 10; and 118c-2, Sec. 10. In our opinion, the Commissioner cannot agree to the proposed manner of fixing the rate of contributions.

Under the provisions of Part III(n), the Commissioner would be required to turn over to a private corporation certain property which is listed on the State Comptroller's records as property belonging to the State of Texas and certain funds held in the First National Bank of Harlingen, Texas under the account of the Texas-Federal Inspection Service consisting of contributions collected by the Texas Department of Agriculture under a previously existing agreement between the State and the Federal Government.

Since, as previously pointed out, the Commissioner is not authorized to enter into a cooperative agreement to which a private corporation is a party, the Commissioner could not agree to the provisions of Part III(n) of the proposed agreement.

Part III(k) of the proposed agreement proposes to use contributions collected from growers and shippers who use the inspection services under the proposed agreement to repay a private debt of $32,000 which Inspection Association, Inc. now owes to agencies of the Federal Government. Although under the statutes under consideration the Commissioner is given a wide latitude of discretion in the use of the contributions collected, the legislative intent is clearly apparent in requiring that they be used to defray the necessary expenses of inspecting, grading and classifying agricultural products. Our opinion is that the repayment of such loans would not be a necessary expense of inspecting, grading, and classifying agricultural products under a valid new cooperative agreement between the Federal Government and the State of Texas. Therefore, the Commissioner could not agree to the provisions of Part III(k).

However, the statutes under consideration clearly give the Commissioner authority to handle the contributions collected under a cooperative agreement in accordance with the terms of the agreement. The termination clause of the agreement between the Federal Government and this State which was terminated on July 31, 1953 provided that:

> "upon the termination of this agreement any balances remaining in the hands of the Texas Department of Agriculture after all proper charges incurred in the conduct of the work provided for under this agreement have been paid, may be used for the conduct of activities in the State of Texas consistent with the purposes set forth in this agreement provided that such disposition shall be mutually agreed upon by the cooperating

> parties and provided further that in the event no agreement can be reached, the balances shall be equally divided between the cooperating parties hereto and that portion reverting to the Production and Marketing Administration shall be covered in to the Treasury of the United States as Miscellaneous Receipts."

It is our opinion, therefore, that the Commissioner could agree with Federal authorities to devote the funds and property which accrued or accumulated under the former cooperative agreement to the conduct of the inspection program under a new cooperative agreement. Thus the funds now on deposit in the First National Bank of Harlingen, Texas could be used to pay salaries, purchase office fixtures, furniture, and other equipment, and for such other purposes as may constitute necessary expenses in connection with such inspection program.

We are also of the opinion that the inspection programs of the State of Texas and of the Federal Government which are currently being maintained in this State on a separate and distinct basis constitute "the conduct of activities in the State of Texas consistent with the purposes set forth" in the former cooperative agreement.

It is our opinion, therefore, that under the provisions of the termination clause of the former cooperative agreement the Commissioner of Agriculture could agree with the Federal authorities that these funds be used to pay any expenses or obligations which are, or which have been, incurred in carrying out the separate inspection programs of both the Federal Government and the State of Texas.

The property which was acquired through the use of contributions under the former cooperative agreement would constitute a substitution of property for funds, or a valid conversion of funds to property, and such property now remaining on hand would, therefore, be subject to the same provisions of the above cited termination clause of that agreement. Thus, it is our opinion that the Federal authorities and the Commissioner of Agriculture could agree that such property be devoted to, and used in, the separate inspection programs of the State of Texas and the Federal Government.

There are many other related provisions of the proposed agreement which are objectionable. However, since they are directly related to the fact that a private corporation would be a party to the agreement and would not be present in any valid agreement between the State and the Federal Government we feel it unnecessary to discuss them herein.

Our opinion is that the Commissioner of Agriculture cannot enter into the proposed cooperative agreement between the Production and Marketing Administration, United States Department of Agriculture, Inspection Association, Incorporated, and the Texas Department of Agriculture.

Yours very truly,

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